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Attorneys for Material Witnesses
Shun Biao Zhao, Kong Xiang Hu,
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IN RE MATERIAL WITNESS

FILED
JUL 11 2008
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN J. COTA,

Defendant.

Case No.: CR 08-0160 SI

**RESPONSE TO DEFENDANT'S MOTION
TO VACATE DEPOSITION DATES**

I. INTRODUCTION

Material Witnesses Shun Biao Zhao, Kong Xiang Hu, Liang Xian Zheng and Zong Bin Li hereby respond to Defendant John Cota's Ex Parte Motion to vacate the current dates set for the Rule 15 depositions set to commence on July 21, 2008. In support of his motion, defendant cites the recent production by the government of substantial amounts of new discovery that defendant claims is relevant to the examination of these witnesses. Defendant, however, has failed to demonstrate that the new discovery implicates the effective examination of these four witnesses. Rather, defendant has only made conclusory allegations to the effect that it is impossible for him "to meaningfully confront these witnesses at this time." Defendant's Motion, P.3, LL 16-17.

1 Because the material witnesses have already been detained for an unreasonable period of time and
2 because the defendant has failed to identify with particularity how his examination of these four
3 witnesses is impaired by virtue of the government's late discovery, his motion should be denied.

4 **II. RELEVANT FACTS**

5 Without restating all of the facts relating to the case, counsel notes the following:

6 1. The M/V Cosco Busan collided with (or "allided" with) the San Francisco Oakland
7 Bay Bridge on November 7, 2007, more than seven months ago.

8 2. The Material Witnesses have remained in this district since that time despite the
9 fact that their crewmates departed in December last year.

10 3. The criminal investigation began immediately following the accident.

11 4. The Material Witnesses have at all times cooperated with that investigation, but
12 have always expressed their desire to satisfy their legal obligations and to leave the District as
13 soon as possible.

14 5. Criminal charges have been pending against the defendant John Cota since March
15 17, 2008, nearly four months ago, and the Government's pre-trial discovery obligations attached at
16 that time.

17 6. The false statement allegations against the defendant do not implicate the testimony
18 of the Material Witnesses in any way.

19 7. The defendant's showing of relevance regarding the newly produced discovery is in
20 four parts:

21 a. The Captain and key bridge staff were not properly trained to use certain
22 bridge equipment.

23 b. The Captain did not know how to interpret certain symbols on the
24 Electronic Chart.

25 c. Some of the crew created false after the fact documents.

26 d. Some of the data on the hard drives corroborates the creation of after the
27 fact documentation. Defendant's Motion, P. 3.

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1 **III. DISCUSSION**

2 1. The Material Witnesses

3 The defendant's effort to link the newly produced discovery to the effective examination of
4 these four material witnesses fails on several fronts. In order to fully understand the defendant's
5 shortcoming, it is helpful to distinguish the rank and role of each of the four Material Witnesses
6 who oppose this motion.

7 a. Shun Biao Zhao

8 Zhao was the Second Officer on the Cosco Busan. He was the navigation officer, but he
9 was not on the bridge during the morning of November 7, 2007, when the allision occurred.
10 Rather, he was stationed aft. He has never met or spoken to the defendant.

11 b. Kong Xiang Hu

12 Hu was the Chief Officer on the Cosco Busan. On the morning of November 7, he was not
13 on the bridge and he did not have any navigational responsibilities. Rather, on that morning, Hu
14 was on deck acting as a lookout. He was eating breakfast when the vessel allided with the bridge.

15 c. Lang Xian Zheng

16 Zheng was the Bosun on the Cosco Busan.¹ He was never an officer. He had no
17 navigational or bridge duties or responsibilities. On the morning of November 7, 2007, Zheng
18 was stationed at the forward area of the bow and was acting as a lookout. His sole role in this case
19 is that he was the first person on the Cosco Busan to see the bridge through the fog and called out
20 a warning to the bridge crew over his hand-held radio.

21 d. Zong Bin Li

22 Li was an Able Bodied Seaman (AB1) on the Cosco Busan. He was never an officer and
23 had no navigational responsibilities. He is the only one of these four material witnesses who was
24 on the bridge on the morning of November 7, 2007. He was the acting helmsman that morning.
25 His sole function was to repeat and then execute the orders given to him by the pilot or the captain.
26 He carried out his duties to the letter. In addition, everything that he did and said that morning was

27 ¹ Zheng has secured a new job in China but he will lose the offer if he does not return home by the beginning of
28 August, 2008.

1 captured by the Voyage Data Recorder (VDR) a copy of which is in the possession of the
2 government.

3 2. The "Relevance" of the New Discovery

4 Defendant Cota's first two claims relate to the alleged inability of key officers to make
5 proper use of certain electronic equipment on the bridge. However, three of the four material
6 witnesses herein were not on the bridge during the morning of November 7. The fourth, Li, was
7 not an officer and had no navigational responsibilities. Accordingly, the allegation that certain
8 "key officers" were not properly trained or lacked the requisite skill to utilize the electronic
9 equipment is simply irrelevant to these witnesses' testimony.

10 Defendant Cota's third and fourth claims relate to allegations that certain crew members
11 created false documentation after the allision. To begin with, he fails to explain how this after-the-
12 -fact activity by certain crew members is relevant to defend against the charged Clean Water Act
13 or Migratory Bird violations. (They certainly have no relevance to the False Statement charges.)
14 Further, he does not distinguish between those witnesses who may be responsible for the creation
15 of false documents from those who are not implicated. Certainly for these latter witnesses, these
16 new revelations are entirely irrelevant and can provide no basis for delaying the Rule 15
17 depositions. Absent some meaningful showing in this regard, there remains no principled reason
18 to delay the depositions and further detain these material witnesses.

19 The government is entitled to seek the detention of material witnesses, but only for "a
20 reasonable period of time until the deposition of the witness can be taken pursuant to [Rule 15 of]
21 the Federal Rules of Criminal Procedure." 18 U.S.C. §3144. That reasonable period of time has
22 already been taxed to its constitutional limits. These material witnesses already have agreed to a
23 two month extension of time to have their depositions taken. Any further delay is unconscionable.
24 The Court should not permit it.

25 **IV. CONCLUSION**

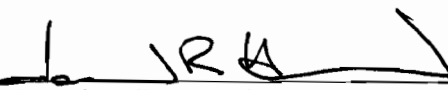
26 The Rule 15 depositions of these four witnesses can and should be commenced on July 21,
27 2008. Any delay beyond that date is unfounded and unreasonable. The Material Witnesses
28 respectfully urge this Court to order that the depositions be completed by that date and that the

1 Material Witnesses may no longer be detained after that date and are no longer subject to any
2 restrictions imposed by the Court. The Material Witnesses further request that the Court direct the
3 United States Attorneys Office and the United States Marshals Service pay for the cost of their
4 travel home following the completion of their respective depositions or by August 1, 2008,
5 whichever occurs earlier.

6 Dated: July 11, 2008

7 THELEN REID BROWN RAYSMAN & STEINER LLP

8
9 By



Jonathan R. Howden
Attorney for Shun Biao Zhao, Kong Xiang Hu,
Zong Bin Li and Liang Xian Zheng,
Material Witnesses

PROOF OF SERVICE BY FACSIMILE
Case No. CR 08-0160 SI

I am over the age of 18 and not a party to the within action. I am employed in the County of San Francisco, State of California by Thelen Reid Brown Raysman & Steiner LLP. My business address is 101 Second Street, Suite 1800, San Francisco, California 94105.

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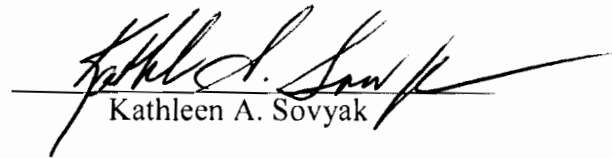
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2 foregoing is true and correct.

3 Executed on July 11, 2008 at San Francisco, California.

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6 Kathleen A. Sovyak

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